

**THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

IN THE MATTER OF THE PROTEST OF
THOMAS M. AND MARTHA L. PARRELL
ID. NO. 02-392149-00 8, PROTEST TO
ASSESSMENT NO. 2354228

NO. 00-26

DECISION AND ORDER

This matter came on for formal hearing on July 28, 2000 before Gerald B. Richardson, Hearing Officer. Thomas and Martha Parrell, hereinafter, "Taxpayers", were represented by Martha Parrell. The Taxation and Revenue Department, hereinafter, "Department", was represented by Donald F. Harris, Special Assistant Attorney General. Based upon the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On March 12, 1999, the Department issued Assessment No. 2354228 to the Taxpayers, assessing \$2,450.10 in gross receipts tax, \$245.02 in penalty and \$1,255.68 in interest for reporting periods January through December, 1995.
2. On April 5, 1999, the Taxpayers filed a written protest to Assessment No. 2354228.
3. The basis of the Department's assessment is that it received information from the Internal Revenue Service ("IRS") that the Taxpayers had reported \$40,883.75 of gross receipts from a business or profession on a Federal Schedule C for the 1995 tax year which were not reported to the Department for gross receipts tax purposes.
4. The amounts reported on the Taxpayers' 1995 Schedule C were amounts that Mrs. Parrell received as compensation from Educare Community Living Corporation, hereinafter, "Educare,"

for nursing services during 1995. These amounts were reported by Educare to the Taxpayer and the IRS on a Federal Form 1099 as medical and health care payments.

5. Mrs. Parrell is a registered nurse.

6. In 1995, Mrs. Parrell was working as a full time employee for another home health care agency, Olsten-Kimberly Quality Care, hereinafter, "Olsten". She was approached by Educare to work for them on a part-time basis as a contract nurse. Educare understood that this work would be in addition to Mrs. Parrell's work for Olsten-Kimberly Quality Care.

7. Mrs. Parrell agreed to be a contract nurse for Educare in early 1995.

8. Educare owned and operated four or five group homes in Las Cruces, New Mexico for mentally delayed and physically delayed clients who required 24 hour care. Although those facilities were staffed with caregivers around the clock, the caregivers were not qualified to dispense medication and do other medical procedures.

9. Mrs. Parrell's primary duty was dispensing medications to Educare's clients at the times specified by the client's doctor. Sometimes this meant tracking the client down at the place a client worked or an event the client was taken to. Mrs. Parrell also ensured that refills were obtained in a timely manner and that the caregiver staff was trained about medication side effects and what to watch for. She also was an instructor for Educare employees, training them on such subjects as back safety, prevention of communicable diseases, diet and nutrition. She gave inoculations to Educare employees. She also attended team conferences where a client's caregivers, treating physician, and parents conferred about a client's treatment plan. Finally, Mrs. Parrell's nursing duties also included being on call, 24 hours a day, on certain days, in order to attend to unexpected medical situations involving Educare clients.

10. Mrs. Parrell was one of two registered nurses who performed nursing services for Educare in Las Cruces. Both nurses were aware of the Educare clients and their medication schedules which needed to be covered. Generally, the nurses worked out the schedule between themselves to provide nursing coverage for the Educare clients as well as the schedule as to who would be on call on any given day. Educare was kept informed of the schedule so that they would know which nurse was responsible for providing coverage at any given time.

11. On average, Mrs. Parrell spent about one hour a day at the Educare offices. She used this time to update and audit the patient files, fill out her time sheets, discuss patient treatments with treating physicians, order prescription refills, prepare correspondence, etc.

12. Educare provided Mrs. Parrell with a desk and telephone at the Educare offices.

13. Educare furnished all medical equipment and supplies needed by Mrs. Parrell in the performance of her nursing duties. Educare offered to pay for a pager and paging service, but since Mrs. Parrell already had a pager provided by Olsten, Mrs. Parrell declined another pager.

14. When Mrs. Parrell was planning to provide a staff training for Educare, the Educare staff would arrange to set up a room, make copies of handouts, arrange to provide a television and a VCR and otherwise take care of the set up for the meeting.

15. Educare paid Mrs. Parrell \$15 per patient visit. She was also compensated \$15 per hour for her office time and training time. She was also paid a lesser hourly amount for the time when she was on call.

16. Mrs. Parrell had no taxes or other withholdings from her paychecks from Educare, nor was she provided worker's compensation or unemployment insurance. She accumulated no sick or annual leave from Educare.

17. Mrs. Parrell wore a nurse's uniform while performing nursing services for both Educare and Olsten. She provided her own uniform, which was customary in the nursing profession.

18. Mrs. Parrell received no compensation or reimbursement for mileage or travel expenses incurred in visiting patients from either Educare or Olsten.

19. Mrs. Parrell performed nursing services for Olsten in much the same manner she did for Educare. Mrs. Parrell made calls upon Olsten patients to dispense medication. She was also required to be on call at various times. She was sometimes on call for both Olsten and Educare at the same time. Olsten was aware that Mrs. Parrell was working for Educare at the same time she was working for them.

20. Olsten treated Mrs. Parrell as an employee. It reported her compensation to her and the IRS on a W-2 form, withheld taxes, etc. Olsten also paid Mrs. Parrell on a per visit basis with an hourly rate for times she was on call. At Olsten, there was a sign up sheet for Mrs. Parrell and the other Olsten nurses to fill out for times when they would take the responsibility for being on call.

21. Other than the difference in the manner in which Olsten and Educare handled the reporting of her compensation to her and the IRS and the fact that Educare did not withhold taxes or provide unemployment or worker's compensation insurance, Mrs. Parrell did not perceive any difference in how she was treated or directed by either agency in terms of her job assignments and duties.

22. Sometime in mid-1995, Mrs. Parrell quit Olsten and went to work for another home health care provider, First American Healthcare. First American Healthcare also treated Mrs. Parrell as an employee. The only difference between Mrs. Parrell's treatment by Olsten and First

American Healthcare is that First American Healthcare provided vacation time and sick leave and offered medical insurance coverage.

23. Mrs. Parrell continued to perform nursing services for Educare after she switched employment to First American Healthcare.

24. The Taxpayer's 1995 Federal Schedule C listed Mrs. Parrell as the proprietor of the business and listed the principal business as "nursing (on contract)". In addition to listing gross receipts from Educare in the amount of \$40,883.75, Mrs. Parrell claimed expenses as follows:

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| insurance | \$ 139.36 |
| interest (business car) | \$1,153.00 |
| laundry | \$ 700.00 |
| rent (of vehicles, machinery and equipment) | \$1,261.00 |
| taxes and licenses | \$ 198.00 |

DISCUSSION

The issue to be determined is whether the compensation the Taxpayer received from Educare was compensation for services performed as an employee or as an independent contractor. This is because there is an exemption from gross receipts tax for the receipts of employees from wages, salaries, commissions or other remuneration for personal services. Section 7-9-17 NMSA 1978.

An employee is not defined in the Gross Receipts and Compensating Tax Act, Chapter 7, Article 9 NMSA 1978, so we will look to the common law definition of employee. In determining whether a person is an employee or an independent contractor, the rule in New Mexico and in general is that the principal consideration is the right to control. Thus, the relationship of employer and employee usually results where there is control over the manner and method of performance of the work to be performed. Where there is only control over the

results, however, and not the details of the performance, the worker is usually considered to be an independent contractor. *Buruss v. B.M.C. Logging Co.*, 38 N.M. 254, 31 P.2d 263 (1934). A more recent pronouncement of this rule can be found in *Harger v. Structural Services, Inc.*, 121 N.M. 657, 663, 916 P.2d 1324, 1330 (1996). In that case the New Mexico Supreme Court adopted the approach set out in the Restatement (Second) of Agency § 220(1) to determine a worker's status as an employee or an independent contractor:

The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, as service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.

Among the factors to be considered are: whether the party employed engages in a distinct occupation or business; whether the work is part of the employer's regular business; the skill required in the particular occupation; whether the employer supplies the instrumentalities, tools or the place of work; the duration of a person's employment and whether that person works full-time or regular hours; whether the parties believe they have created the relationship of employer and employee and the manner and method of payment. The totality of all of the circumstances must be considered in determining whether the employer has the right to exercise that degree of control over a worker so as to make the worker an employee.

The Department has adopted a regulation under Section 7-9-17 to provide criteria by which the status of a worker may be determined. Regulation 3 NMAC 2.12.7. provides as follows:

In determining whether a person is an employee, the department will consider the following indicia:

1. is the person paid a wage or salary;
2. is the "employer" required to withhold income tax from the person's wage or salary;

3. is F.I.C.A. tax required to be paid by the “employer”;
4. is the person covered by workmen’s compensation insurance;
5. is the “employer” required to make unemployment insurance contributions on behalf of the person;
6. does the person’s “employer” consider the person to be an employee;
7. does the person’s “employer” have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean “mere suggestion”).

If all of the indicia mentioned are present, the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present.

The facts of this case present an especially difficult case for determining whether Mrs. Parrell was an employee or an independent contractor of Educare. This is because there are aspects of the relationship between Mrs. Parrell and Educare which would support either result.

The facts which would support a conclusion that Mrs. Parrell was an employee are that she was provided with all necessary supplies and equipment to do her job¹, as well as an office. Educare provided the office support for the trainings she gave. She received an hourly wage for some of her duties. Perhaps the most compelling fact is that except for the withholding of taxes and insurance fees, Mrs. Parrell was treated the same and her work was handled in much the same manner as she was by Olsten, who treated Mrs. Parrell as an employee.

On the other hand, there were many facts which would support a conclusion that Mrs. Parrell was an independent contractor. She was not closely directed or controlled by Educare as to the methods by which she carried out her job duties. She and the other nurse worked out the schedule between themselves, with Educare being primarily concerned with the result, that its patients received their medications and other nursing care in a timely and professional manner.

¹ Educare did not provide Mrs. Parrell’s uniforms, but Mrs. Parrell testified that it was standard practice for nurses to provide their own uniforms, a fact borne out by the fact that Olsten, which treated Mrs. Parrell as an employee, did not provide her uniforms, either. Additionally, neither Educare or Olsten provided vehicles for Mrs. Parrell to use when carrying out her duties, nor did either provide her reimbursement for the mileage she incurred in performing her duties.

She was paid by the patient visit for all but her time in the office and on-call. Perhaps the most compelling fact which supports a conclusion that she was an independent contractor, however, is that she was aware from the outset of her engagement with Educare that she was being hired on a contract basis with no employee benefits. She also treated herself consistently with that status when she filed Schedule C of her federal income tax return.

In general, the law in New Mexico is that taxpayers must file consistently for both state and federal purposes. *Co-Con, Inc. v. Bureau of Revenue*, 87 N.M. 118, 259 P.2d 1239 (Ct. App. 1974) *cert. denied*, 87 NM. 111, 529 P.2d 1232 (1974), *Stohr v. New Mexico Bureau of Revenue*, 90 NM. 43, 559 P.2d 420 (Ct. App. 1976) *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977), *Sutin, Thayer & Browne v. Revenue Division of the Taxation and Revenue Department*, 104 N.M. 633, 725 P.2d 833 (Ct App. 1985), 102 NM 293, 694 P.2d 1358 (1986).

A recent administrative decision found an exception to that rule in the context of the issue in this case, whether a taxpayer was an independent contractor or an employee, where the taxpayer received no federal tax benefit from reporting his compensation on a Federal Schedule C and the taxpayer never intended to treat himself as an independent contractor by filing the Schedule C.

In the Matter of the Protest of Michael L. Flure, Decision and Order No. 00-24. That exception would not apply in this case because the Taxpayers did receive a federal tax benefit from the filing of the Schedule C in that a number of expenses were claimed against the income reported and Mrs. Parrell understood that she was being treated as an independent contractor by Educare.

In this case, I am persuaded that Mrs. Parrell was an independent contractor and not an employee of Educare. Most persuasive in arriving at this conclusion was Mrs. Parrell's understanding that she was being treated as an independent contractor by Educare and her

acceptance of her position on those terms, combined with her treating her compensation consistently with that of an independent contractor for federal income tax purposes.

CONCLUSIONS OF LAW

1. The Taxpayers filed a timely, written protest of Assessment No. 2354288 and jurisdiction lies over the parties and the subject matter of this protest.
2. Mrs. Parrell's compensation received from Educare was received in the capacity of an independent contractor.
3. The Taxpayers are not entitled to an exemption, pursuant to Section 7-9-17 NMSA 1978, for the compensation Mrs. Parrell received from Educare because that compensation was not received as an employee of Educare.

For the foregoing reasons, the Taxpayers' protest IS HEREBY DENIED.

DONE, this 31st day of August, 2000.